

November 13, 2009

Maria Pallante
Associate Register, Policy & International Affairs
U.S. Copyright Office
Office of Policy & International Affairs
Copyright GC/I & R
P.O. Box 70400
Washington, DC 20024

Dear Ms. Pallante:

Please accept the attached comments in response to the Notice of Inquiry and Request for Comments on the Topic of Facilitating Access to Copyrighted Works for the Blind or Other Persons With Disabilities published in the Federal Register on October 13, 2009.

RFB&D again appreciates the opportunity to engage in this conversation about the World Blind Union treaty formally proposed to the World Intellectual Property Organization in May, and how that treaty would interact with current U.S. law were it to be adopted. As a leader in providing accessible educational materials in this country, RFB&D fully supports the creation of a copyright exception that facilitates easier access to printed materials for people with print disabilities around the world.

Sincerely,

John Kelly
President & CEO

Recording for the Blind & Dyslexic (RFB&D) Response to Notice of Inquiry and Request for Comments on the Topic of Facilitating Access to Copyrighted Works for the Blind or Other Persons With Disabilities

November 13, 2009

Subject 1 – How the treaty proposal would interact with United States law under Title 17 or otherwise

The proposed treaty closely mirrors the existing copyright exception found in Section 121 of Title 17. There are, however, three areas of impact on U.S. law.

First, it is unclear how the treaty defines the population eligible to receive materials produced under the auspices of this agreement. Article 1 identifies persons with “other disabilities in reading text”. Section (d) of Article 2 refers to “reading disabled”. Article 15 would require the contracting parties to extend the provisions of the agreement to “persons with any other disability who, due to that disability, need an accessible format of a type that could be made under Article 4 in order to access a copyright work to substantially the same degree as a person without a disability.” These provisions clearly demonstrate the parties’ interest in applying a functional definition to the eligible population to ensure that all individuals that require accessible materials are covered.

The treaty could, however, unintentionally exacerbate existing confusion and conflict among the various U.S. laws that govern access to printed materials. For example, the treaty does not define the terms “reading disabled” or “other disabilities in reading text”, nor does Article 15 identify what constitutes “need” or who makes that determination.

In earlier comments provided on this topic, RFB&D explained in detail the existing contradictions in U.S. law. Section 121 of Title 17 defines the eligible population consistent with the act entitled “An Act to provide books for the adult blind.” The implementing regulations for that Act have been interpreted in a number of different ways by stakeholders as the disability environment has evolved. Research, for example, has demonstrated the physiological basis of reading-related learning disabilities, making those with such disabilities eligible under the “physical limitations” criteria in the regulations.

Reading disabilities, however, are defined in the regulations separately and require a medical doctor’s determination. These provisions contradict the existing research and common practice, particularly within education. In schools, education professionals are typically responsible under the Individuals with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act of 1973 for determining if a student needs accessible content. Schools that limit accessible content among their students with reading disabilities to only those with a medical diagnosis risk violating Section 504 and IDEA. The proposed treaty should be clarified to cover all individuals with print disabilities based on existing research and practice, and U.S. copyright and education law should conform to that definition.

Second, Article 8 of the proposed treaty explicitly provides for the import and export of accessible content. Currently, Section 121 of Title 17 is silent on this issue. U.S. copyright law should be clarified to allow for this cross-border exchange of materials among authorized entities consistent with the proposed treaty.

Third, Article 16 of the treaty defines “Accessible format” broadly to encompass any alternative format that provides equal access for an individual with visual impairment or a reading disability. This differs from the approach adopted in Section 121 of Title 17, which defines specific “specialized formats”. U.S. law should be interpreted consistently with the proposed treaty, focusing on access and technological protections to copyright rather than specific formats. This approach would also protect authorized entities’ rights under Section 121 to produce fully accessible materials even as content is increasingly published based on universal design principles. As technology progresses rapidly, copyright law should allow for the adoption of new technologies for accessible content while maintaining appropriate copyright protections.

Subject 2 – How the treaty proposal would interact with the international obligations of the United States

The UN Convention on the Rights of People with Disabilities was signed by the United States in July. As stated in Article 3 of the proposed treaty, the obligations under this treaty are consistent with that Convention.

The definition of “communication” in Article 2 of the Convention is consistent with the examples of accessible formats listed in Article 16 of the proposed treaty. Also, Article 9 of the Convention requires each State Party to ensure access for all people with disabilities to, among other things, information and communications. Article 21 of the Convention guarantees the right to receive information “through all forms of communication of their choice.” And Article 24 of the Convention requires signatories to facilitate “the learning of Braille, alternative script, [and] augmentative and alternative modes, means and formats of communication...” The obligations of the United States under the proposed treaty would complement those found under the Convention and facilitate the United States’ compliance with the latter.

Subject 3 – The benefits or concerns created by the proposed treaty

The proposed treaty would produce significant benefits for individuals with print disabilities around the world. RFB&D receives requests for accessible titles from individuals and specialized libraries in other countries regularly. The treaty would provide RFB&D the freedom to export materials to similar organizations and individuals in other countries and meet those needs.

Additionally, authorized entities and individuals within the United States could acquire materials produced in other countries. This could be particularly beneficial for the non-English speaking populations of this country. Authorized entities within the U.S. have limited ability to create accessible content in foreign languages.

Facilitating greater exchange of accessible content and less duplication of production efforts will benefit authorized entities and individuals with print disabilities. Existing agreements to exchange accessible content between specialized libraries in the United Kingdom and Australia provide useful examples of those benefits.

Authorized entities in the U.S. will need protection from liability when this content is provided across borders. Broad and non-restrictive approaches to compliance should be adopted to ensure that eligible populations are served with materials provided under the auspices of this treaty. Such approaches should protect the rights of copyright holders without creating burdensome procedures that impede the delivery of needed materials to individuals with print disabilities.

Finally, the confusion around the population served by the treaty was discussed at length under Subject 1. The population should be defined to include all individuals with print disabilities, and U.S. copyright law should conform to that definition.

Subject 4 – Other possible courses of action

RFB&D has explored a number of possible relationships with publishers to facilitate access to printed materials for individuals with print disabilities. RFB&D sees opportunities for future partnerships with publishers to produce their content in accessible formats, under license, with distribution through both publisher portals and RFB&D's library. This type of partnership combines the accessible content providers' expertise with the distribution channels provided by publishers. Such efforts expand the availability of accessible content to individuals ineligible under Section 121 but who could benefit from content in alternative formats.

Authorized entities can also supplement digital text produced by publishers with descriptions of graphical content. Producing heavily technical textbooks, particularly in the subjects of math and science, in a digitally accessible format remains a challenge because of the heavy use of graphics.

These two examples demonstrate the potential for collaboration between authorized entities and textbook publishers, and RFB&D is excited about the possibilities. These alternatives, however, should not replace the copyright exceptions individuals with print disabilities rely on to receive the materials they need in a timely manner. Even as new partnerships are formed and new technologies developed, the copyright exceptions contained in Section 121 and proposed in this treaty will continue to be necessary to guarantee access to the printed word for all.